No. 88-23 (8)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, As Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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Petition For Certiorari Filed July 6, 1988
Certiorari Granted October 11, 1988

1989

Respondents Ilsa Klinghoffer and Lisa Klinghoffer, as Co-Executrixes of the Estate of Leon and Marilyn Klinghoffer submit RESPONDENTS' BRIEF ON THE MERITS against Respondents Chandris Cruise Lines and Chandris (Italy) Inc. only.

All other Respondents submit RESPONDENTS' BRIEF ON THE MERITS against Petitioner Lauro Lines s.r.l., and Respondents Chandris Cruise Lines and Chandris (Italy) Inc.

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* Fischer & Kagan is Counsel of Record for Respondents Ilsa and Lisa Klinghoffer, as Co-Executrixes of the Estate of Leon and Marilyn Klinghoffer.

** Morris J. Eisen, P.C. is Counsel of Record for Respondents Sophie Chasser, Anna Schneider, Viola Meskin, Seymour Meskin, Sylvia Sherman, Paul Weltman and Evelyn Weltman.

*** Newman Schlau Fitch & Burns, P.C. is Counsel of Record for Donald E. Saire and Anna G. Saire.

QUESTION PRESENTED

Is an order of a United States District Court denying enforcement of a foreign forum-selection clause appealable as a collateral final order?

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Joint Appendix ("JA") at 3. The de-

cision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed at JA, 17.

JURISDICTIONAL STATEMENT

The Order below sought to be reviewed is dated April 7, 1988. It was entered April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § § 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro de Altri-Gestione m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri-Gestione Armatoriali Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Columbo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984, ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the vessel as a cruise ship. Tickets were sold to passengers worldwide. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to promote bookings and distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The ticket held by each passenger contained 32 provisions. Among them was the following:

> Art. 31—VENUE OF JUDICIAL PROCEEDINGS—All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived . . .

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A. § 1332.*

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York in personam jurisdiction, the ticket forum-selection clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum-selection clause, the District Court stated, in part:

> I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States. JA 20

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

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* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdiction allegation in the Complaint).

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum-selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) cert. granted, 336 U.S. 917 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction.

> We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is the right to have the binding adjudication of claims occur in a certain forum. . . . the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed. *Chasser et al. v. Achille Lauro Lines et al.*, 844 F.2d 50, 55 (2d Cir. 1988).

The Second Circuit concluded that orders denying enforcement of foreign forum-selection clauses are not immediately appealable as collaterally final orders because "refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment." *Chasser et al., supra*, at 53.

SUMMARY OF ARGUMENT

Title 28 United States Code § 1291 gives the Courts of Appeal jurisdiction to review final decisions of the District Courts. The collateral order doctrine is a narrow exception whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. *Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. U.S.*, 431 U.S. 651, 660-62 (1977).

The narrowness of the collateral order doctrine is a clear indication of intentional judicial deference to the strong Congressional preference against piecemeal litigation. *Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1184 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985). When as herein, an interlocutory order will be reviewable on appeal from final judgment, immediate review should not be granted simply because efficiency might be fostered, or because it may be difficult to persuade an appellate court to reverse after final judgment. *Stringfellow, supra; Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).

It has been clearly established by the Second, Fifth and Seventh Circuits that the refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment. *See Chasser, et al. v. Achille Lauro Lines, et al.*, 844 F.2d 50 (2d Cir. 1988); *Louisianna Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir. 1984).

> The denial of the motion to dismiss on the basis of a contractual forum selection clause should not be differentiated from, and any less subject to correction upon final judgment appeal, than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. *Chasser et al., supra*, at 54.

The Third Circuit in *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-197 (3rd Cir. 1982) has

concluded otherwise due to a misplaced emphasis on 28 U.S.C. § 2105 which provides:

> there shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

The Court in *Coastal Steel* assumed "matters in abatement" as used in 28 U.S.C. § 2105 to mean any non-jurisdictional ground for dismissal that would leave the parties free to pursue suit in another forum. The Court failed to consider that this would necessarily encompass motions to dismiss on grounds of forum non conveniens or improper venue, both of which are held to be reviewable upon final judgment. It is apparent that the definition used in the *Coastal Steel* decision was a means to reach a desired end. Upon further scrutiny, the use of this definiton is inconsistent with current appellate practice.

The Eighth Circuit addressed the appealability issue in *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) concluding that the refusal to dismiss on forum-selection grounds is effectively unreviewable on appeal from final judgment. However, the Court's reasoning, that a Missouri trial was not what was contemplated by the parties, effectively utilized the merits of the appeal to decide the appealability question. It becomes apparent that the Court used incorrect rationale to determine appealability in *Farmland*.

The extensive amount of judicial consideration given the enforceability question of forum-selection clauses (ie: number of pages in a contract, the placement of each phrase, and the size of the type utilized) clearly indicates that if a court has erroneously failed to support such a clause, it's order may be reversed upon appeal from final judgment. The right to secure adjudication in a particular forum is not lost simply because enforcement is postponed.

ARGUMENT

I. AN ORDER DENYING ENFORCEMENT OF A FORUM SELECTION CLAUSE IS NOT A COLLATERAL FINAL ORDER IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291.

Petitioner argues in essence that the Court's denial of the motion made for dismissal on forum-selection grounds is a final order insofar as it determines the forum where litigation will be conducted and that as such it is immediately appealable under 28 U.S.C. § 1291, as excepted by the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

While 28 U.S.C. § 1291 gives the Courts of Appeal jurisdiction to review all "final decisions" of the District Courts, a denial of a motion to dismiss has been consistently held not to be a final decision insofar as the denial leaves the controversy pending. *See Catlin v. United States*, 324 U.S. 229, 236 (1945). The collateral order doctrine is a narrow, judicially created exception to 28 U.S.C. § 1291, which in limited circumstances, allows an immediate appeal from orders which are collateral to the merits of the litigation and which cannot be adequately reviewed after final judgment.

In dispositive comment on the collateral order doctrine, this Court stated in *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)):

> "The collateral order doctrine is a "narrow exception". . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. See *Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. Unites States*, 431 U.S. 651, 660-62 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: it must "conclusively determine the disputed question", "resolve an important issue completely separate from the merits of the action", and "be effectively unreviewable on appeal from a final judgment."

The explicit narrowness of the collateral order doctrine is a clear indication of intentional judicial deference to the strong Congressional preference against piecemeal litigation, as well as a recognition that judicial efficiency will be fostered insofar as questioned interlocutory orders may become moot by the time final judgment is entered. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1184 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985). When, as herein, an interlocutory order will be reviewable on appeal from final judgment, immediate review should not be granted simply because efficiency might be fostered, or because it may be difficult to persuade an appellate court to reverse after final judgment. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177 (1987). As stated by the Court in *Richardson-Merrell Inc. v. Koller:*

> the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress. 472 U.S. at 436.

II. THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON THE QUESTION OF IMMEDIATE REVIEW OF DISTRICT COURT ORDERS DENYING ENFORCEMENT OF FORUM CLAUSES.

The Circuit Courts have split on the question presently before the court in both their opinions and supporting rationale. The most compelling view however, is that espoused by the Fifth, Seventh, and Second Circuits, which have clearly established that the refusal to dismiss on forum-selection grounds is not effectively unreviewable on appeal from final judgment, and as such, is not immediately appealable pursuant to the narrowly construed collateral order doctrine. *See Chasser, et al. v. Achille Lauro Lines, et al.*, 844 F.2d 50 (2d Cir. 1988); *Louisianna Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir. 1984).

The Third Circuit has concluded otherwise due to a misplaced emphasis on 28 U.S.C. § 2105, which this Circuit has

erroneously concluded renders said refusals unreviewable on ultimate appeal from final judgment. *See Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-197 (3rd Cir. 1982). Title 28 U.S.C. § 2105 provides:

> there shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

If this Congressional limitation is read literally the unqualified use of the words "no reversal" would effectively preclude interim review as well as review upon final judgment. The collateral order doctrine, which interprets finality within the meaning of 28 U.S.C. § 1291 would not apply in that it is concerned only with the timing of review. It assumes reviewability and focuses only on the difficulties raised by the postponement of review until final judgment. The collateral order doctrine has not, and cannot, be used to review at any time an order of a type that Congress has made unreviewable in principle.

It is evident that 28 U.S.C. § 2105 is not to be taken literally due to resulting inequities. The Court in *Coastal Steel* assumed "matters in abatement", as used in 28 U.S.C. § 2105, to mean any nonjurisdictional ground for dismissal that would leave the parties free to pursue suit in another forum. 709 F.2d at 196. However, this definition would necessarily encompass motions to dismiss on grounds of forum non conveniens or improper venue, both of which are held to be reviewable on appeal from final judgment. *See In re Air Crash Disaster*, , 821 F.2d 1147, 1166-68 (5th Cir. 1987) (reviewing denial of motion to dismiss for forum non conveniens); *Piper Aircraft Co. v. Reyno*, , 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue).

It is apparent that the definition used in the *Coastal Steel* decision was a means to reach a desired end. Upon further scrutiny, the use of the above definition is inconsistent with current appellate practice.

The Eighth Circuit addressed the issue in *Farmland Industries Inc. v. Frazier-Perrott Commodities Inc.*, 806 F.2d 848 (8th Cir. 1986). The Court concluded that a District Court Order refusing to apply a forum-selection clause is immediately appealable. In examining whether a forum-selection clause will be effectively unreviewable on appeal, the Court explained:

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination of the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. 806 F.2d at 851.

The Court specifically states that the defendants could raise the issue after a final determination on the merits and possibly gain a new trial. Further, the Court, by examining what was contemplated by the parties when they signed the contract, effectively utilized the merits of the appeal to decide the appealability question. It becomes apparent that the Court used incorrect rationale to determine appealability in *Farmland*.[1]

III. THE CONTENTION THAT THE RIGHT GRANTED IN A FORUM-SELECTION CLAUSE, IF ENFORCEABLE, MUST BE VINDICATED IMMEDIATELY OR IT IS LOST, LACKS MERIT.

[1] For additional decisions of the Third and Fourth Circuits, see *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3rd Cir. 1986); *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3rd Cir. 1987); *Hodes v. S.N.C. Achille Lauro*, Nos. 88-5086 slip op. (3rd Cir. September 22, 1988); *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988).

A party resisting the enforcement of a forum-selection clause must show the clause to be unreasonable.

> The current facts indicate that the plaintiffs were not adequately directed to the terms inside the ticket by defendant. Whether a notice on the face of a ticket is sufficient to "draw the passengers attention to the conditions" within, and thereby incorporate those conditions into the ticket/contract, depends upon the particular circumstances of each case and the ticket involved. It is not uncommon for a Court in the process of scrutinizing a ticket (in order to determine a defendant carrier's motion to dismiss) to engage in consideration of such minutia as the shape of the ticket, how it is bound, the number of pages, the placement of each phrase, the size of the type utilized, the number of columns of print, the languages used and the color of paper and ink employed. *McQuillan v. Italia Societa Per Azione Di Navigazione*, 386 F.Supp. 462 (S.D.N.Y. 1974), aff'd, 516 F.2d 896 (2d Cir. 1975).

The extensive amount of judicial consideration given the enforceability question of forum-selection clauses clearly indicates that if a Court has erroneously failed to enforce such a clause, its order may be reversed upon appeal from final judgment. The right to secure adjudication in a particular forum, which is the goal of a forum-selection clause, is not lost simply because enforcement is postponed.

CONCLUSION

It is respectfully submitted that the Order of the United States Court of Appeals for the Second Circuit, dismissing for want of appellate jurisdiction the appeal of Lauro Lines from an Order of the United States District Court for the Southern District of New York denying enforcement of a foreign forum-selection clause, must be affirmed.

Dated: January 24, 1989

Respectfully submitted,

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